NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1306

UNITED STATES OF AMERICA

v.

JAMES ANTHONY HUGHES,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
D.C. Crim. No. 00-cr-00173-1
District Judge: The Honorable Sylvia H. Rambo

Submitted Under Third Circuit LAR 34.1(a)
July 15, 2003

Before: McKEE, BARRY, and ROSENN, Circuit Judges

(Opinion Filed: July 28, 2003)

OPINION

BARRY, Circuit Judge

Defendant James Hughes was charged in a two-count indictment and, on August 9, 2000, pled guilty to distribution and possession with intent to distribute in excess of 50

grams of crack cocaine and 5 kilograms or more of cocaine in violation of 21 U.S.C. § 846. The government agreed to recommend a three level reduction for defendant's acceptance of responsibility, to move for the dismissal of any remaining counts after sentencing, and to make a § 5K1.1 motion if it determined that defendant furnished substantial cooperation.

The Presentence Report ("PSR") calculated a criminal history of VI and a total offense level of 35, which resulted in a sentencing range of 292-365 months. After objections to the PSR were made, an amended PSR issued, with the addendum stating that defendant's guideline range would remain unchanged even if, *arguendo*, all of his objections were sustained because he was properly classified as a career offender.

On January 19, 2001, the District Court imposed a 240-month sentence, adopting the factual findings and guideline recommendations of the PSR. This sentence included a 52-month downward departure upon motion of the government for a departure of at least three levels in light of defendant's substantial assistance.

Attorney Frank Arcuri, who was appointed to represent defendant on appeal, has moved to withdraw and has filed an Anders brief. Inasmuch as our independent review of the record shows no non-frivolous issues that could be raised on appeal, the judgment of the District Court will be affirmed and counsel's motion to withdraw will be granted.

If, "after a full examination of all the proceedings," a defendant's attorney "decide[s that] the case is wholly frivolous," the attorney may present this conclusion to

the court and request leave to withdraw from the case. Anders v. California, 386 U.S. 738, 744 (1967). An appeal may be deemed frivolous if it "lacks any basis in law or fact." McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 439 n. 10 (1988).

The lone issue identified by defense counsel as worthy of considering is whether the District Court abused its discretion when it "only reduced [defendant's] sentence fifty-two months below the bottom end of the standard guideline range, where the [defendant] provided substantial information which led to the indictment and conviction of numerous individuals." (Anders Brief at 2). According to counsel, defendant "contends that his sentence is excessive in light of his substantial cooperation at both the federal and state levels. He further argues that he is rehabilitated and that the hardship of his family conditions warrant a greater mitigation of his sentence. Finally, [defendant] challenges the sentencing court's discretion in imposing 240 months, which was only 52 months below the bottom end of the standard guideline range," despite the extensive and fruitful cooperation he furnished. (Id. at 8).

It is clear that a district court's discretionary refusal to depart downward, when the option to do so is explicitly acknowledged and rejected, is not reviewable on appeal. See, e.g., United States v. Stevens, 223 F.3d 239, 247 (3d Cir. 2000); United States v. Mummert, 34 F.3d 201, 205 (3d Cir. 1994). Similarly, "we lack jurisdiction to review the extent of a District Court's discretionary downward departure for substantial assistance to the government." United States v. Torres, 251 F.3d 138, 145 (3d Cir. 2001). Thus, the

District Court's very act of granting a 52-month downward departure is an acknowledgment of its authority that has divested us of jurisdiction over defendant's downward departure claim.

Defendant's *pro se* submission raises the specter of a violation of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This mandate, however, presupposes that a defendant has not pleaded guilty thereby waiving his right to a jury trial and the submission to a jury of the amount and/or identity of the drugs at issue. In any event, even were it otherwise, in light of defendant's counseled admission in his plea colloquy that he distributed in excess of fifty grams of crack cocaine and the finding of the District Court that defendant distributed at least 500 grams but less than 1.5 kilograms of crack cocaine, "[b]ecause application of the Sentencing Guidelines in this case does not implicate a fact that would increase the penalty of a crime beyond the statutory maximum, the teachings of Apprendi...are not relevant here." United States v. Cepero, 224 F.3d 256, 267 n. 5 (3d Cir.2000).

The defendant next contends that the District Court erred when it adopted, for sentencing purposes, the PSR's findings regarding the type and quantity of drugs in his possession, without making its own independent determination as to the existence of the relevant facts alleged in the PSR. See United States v. Gricco, 277 F.3d 339, 355 (3d Cir.

2002) (requiring explicit district court findings where PSR findings are properly challenged). Defendant made an objection to the PSR's findings as to drug type; however, it was dismissed by the PSR as vague and unsubstantiated. Defendant never re-raised the objection with supporting detail. Therefore, he failed to meaningfully challenge any of the PSR's findings concerning his history of drug possession, and the District Court was permitted to accept as true the allegations in the PSR, see id., subject only to plain error analysis. See United States v. Mustafa, 238 F.3d 485, 492 (3d Cir. 2001). We believe that the PSR set forth ample facts from which to conclude defendant was guilty of possessing over 500 grams of crack, and that defendant failed to adequately demonstrate how he would challenge the PSR findings if given the opportunity. Under these circumstances, we can perceive no prejudice, and thus no plain error.[1]

Finally, defendant complains that he was ineffectively represented before the District Court. The general rule is that we will not entertain a defendant's claim of ineffective assistance of counsel on direct appeal. See, e.g., United States v. Cianci, 154 F.3d 106, 113 (3d Cir. 1998); United States v. Gaydos, 108 F.3d 505, 512, n. 5 (3d Cir. 1997). However, "we have recognized that in some cases, albeit rare[ly,] we may have a

[1]The PSR erroneously premised its conclusion that defendant possessed over 500 grams of crack on a misunderstanding of what he admitted to in his plea bargain, and the District Court, in adopting the PSR, failed to notice the error. Defendant initially agreed to plead to possessing over 500 grams of crack, but the agreement was later modified, and he ultimately only pled to possession of at least 50 grams. However, in view of the unchallenged allegations in the PSR, overwhelmingly establishing possession of over 500 grams of crack, we do not believe this oversight to be prejudicial.

sufficient record on appeal to decide the issue and avoid the considerable effort of requiring the defendant to institute a collateral proceeding in order to raise the ineffective assistance of counsel claim." United States v. Cocivera, 104 F.3d 566, 570-71 (3d Cir. 1996). Any claim of ineffective assistance that could be made in this case regarding counsel's failure to preserve defendant's Apprendi and sentencing issues would not fall within that narrow exception.

The judgment of sentence will be affirmed. Counsel's motion to withdraw is granted.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/Maryanne Trump Barry
Circuit Judge